No. 83-300

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation;
Respondents.

BRIEF OF AMICUS CURIAE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

DOWNEY, BRAND, SEYMOUR & ROHWER
GEORGE BASYE
COUNSEL OF RECORD
ANNE J. SCHNEIDER
WILLIAM R. DEVINE
555 Capitol Mall, Suite 1050
Sacramento, CA 95814
(916) 441-0131
ROBERT P. WILL
955 L'Enfant Plaza S.W.
Suite 1203
Washington, D.C. 20024
(202) 554-2470
Attorneys for Amicus Curiae Association of California Water Agencies

DOWNEY OF SAN FRANCISCO, INC. • 100 NINTH ST. • S.F., CA 94103 • (415) 864-6000

QUESTIONS PRESENTED

I. Does the judicially created public trust doctrine take precedence over state constitutional and statutory provisions adopted by votes of the people of California?

II. Does the sudden and unpredictable change in state law effected by the California Supreme Court, destroying the permanent and vested nature of appropriative water rights, constitute a taking in violation of the Fourteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES

Constitutions

Statutes

Rule

Other Authorities

No. 83-300

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

VS.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation;
Respondents.

BRIEF OF AMICUS CURIAE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

CONSENT

In accordance with Supreme Court Rule No. 42, the ASSOCIATION OF CALIFORNIA WATER AGENCIES (ACWA) has obtained from representatives for petitioners and respondents the necessary written consents to file a brief in support of the City of Los Angeles Department of Water and Power Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

This Amicus Curiae Brief is submitted on behalf of ACWA in support of Petitioner. ACWA is a non-profit California corporation. More than 250 public water agencies are members of ACWA. Member agencies provide approximately 85 percent of the agricultural, domestic, municipal, and industrial water delivered in California. More than 7,000,000 acres of land are served. Much of this water is diverted pursuant to appropriative rights acquired under the California Water Code, which are the same type of water rights as those of the Petitioner.

ACWA and its members are vitally interested in the legal issues before the Court in this case. The public trust theories adopted by the California Supreme Court could cause unprecedented disruption to the delivery of water to agricultural, domestic, municipal, and industrial users throughout the state.

ACWA's members rely on the continuity of the California water rights system and on the certainty which the system provides for existing and future water diversion. The decision that appropriative rights can now be reopened and reconsidered at any time to reevaluate competing public trust values threatens both that certainty and continuity. Water rights which have been fully vested under California law have been taken. It is imperative that this Court grant certiorari now and restore appropriative water rights to their proper status as vested property rights.

OPINIONS BELOW

The decision of the California Supreme Court is reported at 33 Cal. 3d 419, and modified at 33 Cal. 3d 726a. The decision and modification are reproduced in the Appendix of Petitioner at pages 1-58. The prior decision and judgment of the lower California court, the Alpine County Superior Court, were not published; they are reproduced in the Appendix of Petitioner at pages 77-82.

STATEMENT OF THE CASE

ACWA adopts the STATEMENT OF THE CASE set forth by Petitioner but wishes to expand on certain portions of the Statement as discussed below.

Importance of this case

State and federal governments have increasingly tried to make water rights as certain as possible. This court has endorsed this goal, stating in its most recent decision in *Arizona v. California* that certainty "is particularly important with respect to water rights in the Western United States". *Arizona v. California*, ... U.S. ....., 102 S. Ct. 1382, 1392 (1983).

This court also noted that the appropriation doctrine is "the prevailing law in the western states, [and] is itself largely a product of the compelling need for certainty in the holding and use of water rights." *Id.* The California Supreme Court's new application of public trust theory not only breaks away from the prevailing movement to increase certainty of water rights, but applies public trust theory to the most certain type of water rights obtainable in California, licensed appropriative water rights.

Petitioner acquired its appropriative water rights by complying with all applicable state statutes and regula-

tions. The appropriative rights it acquired are evidenced by licenses which state a maximum rate, quantity, and season of diversion, subject to terms and conditions. California water rights law assured Petitioner that if it diverted water in accordance with the limitations, terms, and conditions of its licenses, it had a vested right to continue to divert.

This assurance is critically important to Petitioner and all water right holders in California. In reliance on the continued viability of the prior appropriation system and the water rights system in general, Petitioner has made enormous investments of public funds for water diversion and conveyance facilities.

Petitioner is not alone. Many ACWA members have acquired appropriative licenses or permits and have made huge investments of public and private funds for water projects. Water districts, water agencies, and municipalities of all sizes, as well as the massive state and federal projects, rely on the continued integrity of California's appropriation process to obtain permanent and certain water rights. They have complied with the state statutes and regulations, as Petitioner has, in order to perfect secure and certain water rights to ensure that they can continue to serve their water users.

Petitioner, as well as many ACWA members, could be forced to seek alternative water supplies from other areas. Petitioner and ACWA members have relied on being able to continue to take water from their present sources, and consequently have not pursued projects which would have used different sources of water, sources which are now no longer available or feasible. As appropriators are forced

to seek substitute water, the pressure on remaining sources will increase even beyond what it is today.

California water law does not allow water users to plan for possible loss of rights. It is impossible to obtain an appropriative right to water to be used as a contingency, emergency supply. A fundamental precept of California water rights law is that water that is appropriated must be put to reasonable and beneficial use, or the appropriative right is lost. There is, therefore, no protective action Petitioner or ACWA members can take to ensure undisrupted water service to their users in the face of public trust attack. *Nevada County and Sacramento Canal Co. v. Kidd,* 37 Cal. 282, 315 (1869).

The California water rights system has, until the California Supreme Court's decision, required that competing demands for water be balanced and the public interest be considered only *before* appropriation was permitted. This is logical and practical. It allows reasonable planning of water projects to be done. A water right holder must be able to rely on its right to divert continuing *before* it plants permanent crops, *before* it begins to serve expanding municipal supply systems, *before* it expends billions of dollars of public funds for water conveyance facilities.

Now, every appropriative right in California can also be reevaluated *time after time* to reweigh the competing uses which could be made of the water. The California Court's language is broad:

> "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water

> resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust."

Appendix of Petitioner 41.

ACWA members are concerned that the California Supreme Court's novel "power to reconsider allocation decisions" could wreak havoc with financing arrangements for both existing and prospective water diversion and conveyance projects. Where bonds are outstanding, a decision to reallocate water could upset the operation of the project as well as the security of project bond holders who have also relied on vested water rights remaining intact for the life of the project. The impact of the California Court's ruling on future bond and other financing is not yet clear, but the possible application of public trust theories will have to be taken into consideration in financing future projects.

The California Supreme Court considered only the application of public trust theory to appropriative rights. It did not address the question of whether any other types of water rights recognized in California are vulnerable to public trust attack. Although no one can predict the nature and extent of application of public trust theories to limit diversion by riparians or prescriptive right holders or to limit extraction of groundwater, such application appears to be possible. Any expansion of the application of public trust theories would compound the uncertainty created in this case.

Respondents opposing Petitioner's petition may argue that ACWA's fears are overstated. They are not. Water rights are intrinsically fragile rights. They are certain only to the extent that the system upon which they are based remains intact. The decision of the California Supreme Court has shaken the California water rights system to its foundation.

The public and private entities who are responsible for supplying water to the people of the state are faced with a quandary. Even though the people of the state have by Constitutional Amendment approved the appropriation system and mandated the reasonable and beneficial use of water, they must now anticipate that their water rights can be challenged on the basis of public trust theory. No matter how much money, public or private, has been invested in water diversion and conveyance facilities, no matter how long a diversion may have continued, no matter who may be benefitting from a diversion, no matter what interests and parties may be affected by a consequent search for replacement supplies, water rights may now be taken without just compensation in violation of the Due Process Clause of the Fourteenth Amendment.

The Federal Questions Presented

The decision of the California Supreme Court presents the following substantial federal questions which should be reviewed by this court without delay.

First, the California Court elevated public trust principles enunciated by this court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892) above state constitutional and statutory provisions adopted by state-

wide votes of the citizens of California. By so doing, the California Supreme Court incorrectly applied the public trust doctrine. This doctrine was created as a judicial check to protect citizens from questionable acts of legislative and administrative officials. Applying this doctrine to undermine a water rights system adopted by votes of the people constitutes an inexcusable misinterpretation of *Illinois Central* and results in a gross abuse of the due process rights of the voters of the state in violation of the Fourteenth Amendment to the United States Constitution.

Second, by subjecting all vested appropriative rights to reconsideration and reduction without compensation, the California Supreme Court has effected a taking of property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The California Court's decision destroyed previously vested, permanent property rights. It did so in a sudden manner, completely unpredictable, and without precedent. This constitutes a clear taking without compensation.

This matter is ripe for review now. Quantification of damage is not necessary to demonstrate that there is a loss. *See, e.g., Nevada v. United States*, ... U.S. ....., 103 S. Ct. 2906, 2910 (1983). The issues will not be altered or more fully developed by waiting until there is an actual reduction in water rights. Waiting will only cause undue delay in reaching an ultimate decision, cause continued uncertainty, cause numerous water right holders to expend money in search of possible alternative water supplies, and result in great expenditures in both time and money as water rights throughout the state are challenged by interest groups such as the Audubon Society. Failure to address

these important issues today will have a devastating impact on the use and development of water in a state where the economy and well being of its citizens are totally dependent on the continued certainty of water rights and the consequent continuous and rational development of its limited water supplies. These circumstances require immediate review. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975).

ARGUMENT

I

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS REGARDING THE APPROPRIATION AND PERMANENT VESTING OF WATER RIGHTS IN CALIFORNIA ADOPTED BY VOTES OF THE PEOPLE CLEARLY TAKE PRECEDENCE OVER CONTRARY NOTIONS EXPRESSED IN THE JUDICIALLY CREATED PUBLIC TRUST DOCTRINE

The California Supreme Court has elevated common law or "natural law" public trust principles above the will of the people of California. The people clearly and directly expressed their will by voting to adopt the Water Commission Act in 1914, and by initiating and adopting a Constitutional Amendment in 1928. Previous decisions of this Court and Acts of Congress have also recognized the paramount nature of state-adopted systems of water allocation and completely support the states and their citizens in the development of such systems.

It is not clear what paramount authority the California Supreme Court could have been relying on in reaching its decision. It could not have been relying on state common law,

since the elevation of state common law above state constitutional law is clearly contrary to the California Court's own judicial precedents. *See, e.g., Apple v. Zemansky*, 166 Cal. 83 (1913); *San Joaquin and Kings River Canal and Irrigation Co. v. Stevinson*, 165 Cal. 540 (1914); *In Re Braun*, 141 Cal. 204 (1903).

The State Supreme Court may have relied on some notion of "natural law" to reach the frightening conclusion in this case. We question whether there is any place in the American system of jurisprudence for such reliance on "natural law". Can the California Supreme Court create an invulnerable doctrine of "natural law" which neither Petitioner nor anyone else can challenge? Can the California Supreme Court create a "self-evident" doctrine which cannot be changed or overturned by anyone, not the people by Constitutional Amendment and statewide vote, not the State Legislature, not this Court? If the State Court is indeed relying on "natural law", this Court must reject such an arrogation of absolute power.

If, on the other hand, the California Supreme Court was relying on federal common law, it incorrectly interpreted what is recognized as the seminal case, *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), and violated the due process rights of the voters of the state.

A. The Public Trust Doctrine Has Been Incorrectly Applied

In *Illinois Central*, the Court was confronted with a situation where the State Legislature had acted without public consent. This case presents a totally opposite situation.

Here, the people have spoken by statewide vote on two occasions. On both occasions, they confirmed their desire that the California water rights system continue the recognition and granting of vested appropriative water rights.

In the 1914 general election, the voters of California approved adoption of the Water Commission Act, ch. 586, 1913 Cal. Stats. 1012 (1913). The main purpose of the Act was to provide an orderly system for appropriation of water, a system which was based on local customs, adopted and encouraged by the State Supreme Court, and confirmed by Congress and the United States Supreme Court.[1]

---

[1]When the original thirteen states formed a new Union, they retained control of their navigable waters. *See, e.g. Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894). When new states joined the Union, they were admitted on an "equal footing" with the original thirteen states, and thus also acquired control of their navigable waters. *Pollard's Lessee v. Hagan, supra* at 223-224. Since California was admitted to the Union on an "equal footing" with other states, 9 Stat. 452 (1850), it necessarily acquired control of its navigable waters.

In exercising this control the state, from the early gold mining days, has encouraged and authorized the appropriation of water from rivers and streams. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855). These appropriative water rights recognized and approved by the state were confirmed by the Congressional Acts of July 26, 1866, 14 Stat. 253, and July 9, 1870, 16 Stat. 218. These acts in essence confirmed the validity of existing vested appropriative water rights, provided for the acquisition of similar rights in the future, and vowed to protect such water right holders as long as their rights were acquired in accordance with local customs, laws, and court decisions. In construing these acts this court viewed the Acts as voluntary recognition by the federal government of the validity of appropriative water rights and the duty of the government to protect such rights. *Broder v. Natoma Water and Mining Co.*, 101 U.S. 274 (1879); *Atchison v. Peterson*, 87 U.S. 507 (1874). And, as recently as 1978, this Court has reconfirmed its recognition of the paramount nature of state water rights. *California v. United States*, 438 U.S. 635 (1978).

This system was finally adopted as state policy by a vote of the people in 1914.

Against this policy of encouraging appropriation came the decision of the California Supreme Court in *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81 (1926), in which the court held that the riparians, as against an appropriator, were entitled to the entire flow of the river even if the riparian use was unreasonable. Such a principle would have virtually destroyed the appropriation system. In response to *Herminghaus*, the California voters used the initiative process to adopt the 1928 Amendment to the Constitution (now California Constitution Article X, § 2), which has since served as the foundation for the water allocation system in the state. The people of the state thereby wholeheartedly confirmed the state's authority to grant appropriative water rights and preserved the appropriation system.

Illinois Central, which has served as the jumping-off point for many state courts in their pronouncements detailing public trust concepts, is being used by the California Supreme Court to thwart the will of the people as reflected in these two statewide votes. Public trust concepts have always been applied to protect the public from questionable and otherwise unreachable acts of legislators or administrators. J. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.R. 473 (1970). It makes no sense to apply the doctrine to decisions voted on by the people as a whole, as in the 1914 Water Commission Act and 1928 California Constitutional Amendment votes. A careful review of the case

law demonstrates that the public trust doctrine has never before been applied to repeal or modify state constitutional or statutory provisions approved by statewide vote.

This egregious misinterpretation of *Illinois Central* and the resultant illogical and uncalled-for expansion of the scope of the public trust doctrine must be stopped now.

B. The Decision of the California Supreme Court Violates the Due Process Rights of the State's Citizens

As discussed in detail above, the citizens of California have twice voted to preserve California's appropriative water rights system. The first vote in 1914, adopted the statutory framework. This framework was almost destroyed by the 1926 *Herminghaus* decision. But the people of the state used the initiative process to override *Herminghaus* and to give constitutional status to the appropriation system.

Certainly the citizens of the state have some rights to self-government through the electoral process, especially in matters of paramount importance to the state and its citizens. Clearly, the allocation of a scarce water supply in a state where water is the lifeblood of the economy constitutes just such a matter of paramount state importance.

Voting is a fundamental political right because it is preservative of all rights. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The right of citizens to vote and express their will is the cornerstone of our democracy. The California Supreme Court has effectively disenfranchised the citizens of the state by the sudden and unpredictable application of public trust concepts to the state system of water allocation.

By so doing, the California Court has acted in an arbitrary and unreasonable manner to deprive the citizens of California of their fundamental right to vote on matters of paramount state concern. This gross abuse of the due process rights of the voters of California in violation of the Fourteenth Amendment to the United States Constitution demands a stinging rebuke from this Court.

II

SUBJECTING VESTED APPROPRIATIVE WATER RIGHTS TO RECONSIDERATION AND POSSIBLE REDUCTION WITHOUT COMPENSATION CONSTITUTES A TAKING IN VIOLATION OF THE FOURTEENTH AMENDMENT

ACWA adopts Argument III of Petitioner set forth at pages 23-27 of Petitioner's petition, but wishes to add to that argument the following.

The California Supreme Court clearly reduced the quantity, quality, and value of the property rights held by Petitioner and all other appropriative water right holders in the state. The vested and permanent nature of appropriative water rights has been attested to by numerous court decisions, legal treatises, and statutes. *Broder v. Natoma Water and Mining Co.*, 101 U.S. 174 (1879); *Thayer v. California Development Co.*, 164 Cal. 117, 125 (1912); *County of Amador v. The State Board of Equalization*, 240 Cal.App.2d 205, 213 (1966); 3 Farnham, *The Law of Waters and Water Rights*, 2090 (1904); Hutchins, *The California Law of Water Rights*, 40 (1956); California Water Code Sections 102, 109(a), 1201, 1240, 1241, 1429, and 1430.

Appropriative licenses have been the most secure water right obtainable in California. An appropriative license is properly characterized as a permanent easement subject to the condition that water be put to reasonable and beneficial use. Water Code Section 1675. Because an appropriator controls whether water is used reasonably and beneficially or not, the duration of the water right has been controlled by the water right holder.

The decision of the State Supreme Court has had a devastating impact on that control and has effectively reduced the scope and value of the property right held. Appropriative water right holders no longer control their own destiny. Continued application of water to reasonable and beneficial use and compliance with any additional license terms does not now guarantee the continued existence of their water rights. Now outside interests can continually challenge all appropriative water right holders and seek reduction of existing water rights.

This result is comparable to that involving real property, where a permanent easement holder is suddenly informed that he has only a revocable license. The obvious reduction in the quality and value of the permanent easement holder's property rights in this example is precisely what has happened to all appropriative water rights in California.

The California Supreme Court decision in this case clearly constitutes a sudden and unpredictable change in state law which undermines established rules of property law, defeats universally held expectations of inviolability, and takes valuable property rights for public purposes without compensation.

CONCLUSION

The California Supreme Court misinterpreted the public trust doctrine enunciated by this Court in *Illinois Central* and used the doctrine to undermine the will of the people of California as expressed in two statewide votes. By so doing, the California court not only incorrectly interpreted federal law, but also essentially disenfranchised the citizens of the entire state and effected a taking of the property of all appropriative water right holders in the state. If this decision is allowed to stand, the entire water rights system of the state will be disrupted, the will of the people thwarted, and uncertainty will replace the certainty that is essential to proper planning and efficient use of water resources.

ACWA hereby requests that a writ of certiorari issue from this court to review the questions raised and ultimately reverse the decision of the California Supreme Court, thus restoring appropriative water rights to their proper status as vested, permanent property rights.

DATED: September 19, 1983.

Respectfully submitted,

DOWNEY, BRAND, SEYMOUR & ROHWER
GEORGE BASYE
COUNSEL OF RECORD
ANNE J. SCHNEIDER
WILLIAM R. DEVINE

ROBERT P. WILL

Attorneys for Amicus Curiae Association of California Water Agencies